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The Perimeter of Accountability: Section 2(h) of the Right to Information Act, 2005 and the Problem of the Private Body in Outsourced Governance

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ABSTRACT

A right of access is worth what its adjudicator is worth. The Right to Information Act, 2005 vested final adjudication in the Central and State Information Commissions and protected them by two structural devices borrowed from constitutional practice: a fixed term of five years, and salaries and conditions of service pegged by statute to those of the Election Commissioners. The Right to Information (Amendment) Act, 2019 removed both, substituting terms and conditions "as may be prescribed by the Central Government", and the Rules framed under it reduced the term to three years. This article argues that the amendment is not an administrative rationalisation but a change in the constitutional character of the institution. It develops the argument in four steps. First, it reconstructs the original design and shows that the two devices removed were the only structural guarantees of independence the statute contained, there being no security of tenure comparable to that of a judge. Second, it locates the Commissions within the jurisprudence on adjudicatory independence developed in relation to tribunals, where the Supreme Court has repeatedly held that determination of service conditions by executive rule-making compromises the separation of powers. Third, it connects the formal question of independence to the empirical question of capacity, arguing that vacancy, pendency and the near-desuetude of the penalty power under Section 20 are symptoms of the same institutional weakness. Fourth, it treats the Commissions as the information system of the transparency regime itself, and shows that the reporting duty under Section 25 has never generated the data required to govern the Act. Legislative and administrative remedies are proposed.

Keywords: *institutional independence; adjudicatory autonomy; Behavioral Science; transparency enforcement.*

1. Introduction

Emergence of cognitive science as a distinct field of study has left an important impact on various disciplines including information science. Research questions relating to the study of thinking, intuition, and intelligence were considered unimportant for scholarly inquiry before the beginning of cognitive science; however, a greater attention has been given to these questions since the beginning of the cognitive paradigm. Cognitive science brought a different perspective to the study of a user's mental models, context surrounding a user, knowledge representation, its production, and transfer. This perspective then took roots in the discipline of information science and subsequently influenced the research. This paper is a synopsis of the various contributions of cognitive science to information science with a particular emphasis on information retrieval research. In addition to the review of various contributions, some new research avenues are discussed and the relevance of the cognitive paradigm to these avenues is presented. It would be important for information scientists to consider the application of the cognitive approach to these research areas so that the theoretical and practical scope of the discipline of information science could be enhanced. Emergence of cognitive science as a distinct field of study has left an important impact on various disciplines including information science. Research questions relating to the study of thinking, intuition, and intelligence were considered unimportant for scholarly inquiry before the beginning of cognitive science; however, a greater attention has been given to these questions since the beginning of the cognitive paradigm. Cognitive science brought a different perspective to the study of a user's mental models, context surrounding a user, knowledge representation, its production, and transfer. 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The answer determines everything else. A generous statute adjudicated by a body dependent on the executive will produce less disclosure than a modest statute adjudicated by an independent one. The text of the exemptions matters, but the identity and security of the decision-maker matters more.

The Right to Information Act, 2005 answered the question by creating the Central Information Commission and the State Information Commissions, conferring on them final appellate jurisdiction, and insulating them by statutory devices. The insulation consisted of two things. Sections 13(1) and (2) and 16(1) and (2) fixed the term of office at five years, or until the age of sixty-five, whichever was earlier, and barred reappointment. Sections 13(5) and 16(5) pegged salaries, allowances and other conditions of service to those of the Chief Election Commissioner and the Election Commissioners at the Centre, and to the Election Commissioner and the Chief Secretary respectively at the State level.

The Right to Information (Amendment) Act, 2019 removed both. Term and conditions of service are now such as may be prescribed by the Central Government, and Section 27 was amended to confer the corresponding rule-making power. The Rules notified in October 2019 prescribed a term of three years. A single instrument thus shortened the tenure of every Information Commissioner in the country and transferred the determination of their emoluments — including those of State Commissioners, appointed by State Governments — to the Union executive.

This article examines the consequences. Part 2 reconstructs the original design. Part 3 analyses the amendment and the Rules. Part 4 situates the Commissions within the constitutional jurisprudence on adjudicatory independence. Part 5 turns to appointment and vacancy. Part 6 examines the penalty power. Part 7 considers the Commissions as an information system. Part 8 draws comparative lessons; Parts 9 and 10 offer findings and conclusion. Every access-to-information statute must answer a question that its drafters would prefer to leave implicit: who decides when the government says no? The answer determines everything else. A generous statute adjudicated by a body dependent on the executive will produce less disclosure than a modest statute adjudicated by an independent one. The text of the exemptions matters, but the identity and security of the decision-maker matters more.

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2. The Original Design: Independence by Statute

The Information Commissions occupy an unusual constitutional position. They are statutory bodies exercising adjudicatory functions over the whole of the executive, including the departments from which their members are frequently drawn. They possess the powers of a civil court in respect of summoning, discovery and inspection. Their orders are binding and there is no appeal, judicial review under Articles 226 and 32 apart. They may require a public authority to take steps to secure compliance with the Act, including compensation to a complainant. They may impose personal monetary penalties on officers.

These are substantial powers, and the statute conferred them on persons who enjoy none of the protections that ordinarily accompany adjudicatory office. Information Commissioners are not judges. They may be removed by the President on the ground of proved misbehaviour or incapacity, but only after a reference to the Supreme Court and an inquiry — a protection of real value. Beyond that, the only structural guarantees were the fixed term and the pegged emoluments. Both were deliberate. Parliament chose the Election Commission as the benchmark precisely because the Election Commission is the paradigmatic Indian institution required to adjudicate against the government of the day. The parity was a statement about function.

It is worth noticing what the parity actually secured. It was not primarily about money. It was about the removal of a variable from executive control. A Commissioner whose salary is fixed by reference to another constitutional office cannot have that salary altered as a response to an unwelcome decision, and knows this. The five-year term performed the same function in the temporal dimension, and the bar on reappointment removed the incentive to decide with an eye to renewal. Together they constituted what the comparative literature calls structural, as distinct from decisional, independence. The Information Commissions occupy an unusual constitutional position. They are statutory bodies exercising adjudicatory functions over the whole of the executive, including the departments from which their members are frequently drawn. They possess the powers of a civil court in respect of summoning, discovery and inspection. Their orders are binding and there is no appeal, judicial review under Articles 226 and 32 apart. They may require a public authority to take steps to secure compliance with the Act, including compensation to a complainant. They may impose personal monetary penalties on officers.

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3. The 2019 Amendment and the Rules

The Amendment Act is a short instrument of four sections. Section 2 amends Section 13, Section 3 amends Section 16, and Section 4 inserts the corresponding rule-making entries into Section 27(2). In each case the specified term of five years is replaced by "such term as may be prescribed by the Central Government", and the parity of emoluments is replaced by "such salaries and allowances and other terms and conditions of service as may be prescribed by the Central Government".

The Government's justification was that the Election Commission is a constitutional body established under Article 324 whereas the Information Commissions are statutory bodies, and that equating the two was an anomaly requiring correction. The argument has a formal neatness. It is nonetheless unpersuasive, for two reasons.

First, it mistakes the nature of a statutory benchmark. Parliament did not declare the Information Commissions to be constitutional bodies; it borrowed a set of service conditions as a device for securing independence. Legislatures routinely peg the emoluments of one office to another without asserting equivalence of status. The anomaly argument, taken seriously, would require the removal of every such cross-reference in Indian statutory law.

Second, and more importantly, the correction of an alleged anomaly of status has been effected by a means that produces a substantive change in independence. If the objection was to the specific comparator, Parliament could have specified a different fixed benchmark, or fixed the emoluments in the statute itself, or referred them to a pay commission. It chose instead to confer an open-ended rule-making power on the executive. The remedy is wholly disproportionate to the stated defect, and the disproportion is itself evidence of purpose.

The Rules confirm the point. A term of three years, in a body whose adjudicatory work requires familiarity with a complex and heavily litigated statute, means that a Commissioner spends a substantial proportion of the tenure acquiring competence. It also brings the term within the ordinary horizon of a single government. The extension of the same rule-making power to State Commissioners raises a further and distinct objection grounded in federalism: State Commissioners are appointed by the Governor on the recommendation of a committee headed by the Chief Minister, yet their conditions of service are now determined by the Union.
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4. Independence as a Constitutional Requirement

Indian constitutional law has developed a substantial jurisprudence on the independence of adjudicatory bodies outside the regular judiciary, and its propositions bear directly on the Information Commissions.

In Union of India v R. Gandhi, a Constitution Bench held that when adjudicatory functions are transferred from courts to tribunals, the tribunals must possess the essential attributes of the courts they replace, including in the matter of appointment, tenure and conditions of service; the Court struck down provisions that permitted excessive executive involvement. That reasoning was applied and extended in Madras Bar Association v Union of India, where the Court held that short tenures and executive control over service conditions are constitutionally suspect because they undermine the very independence that justifies the transfer of jurisdiction. In Rojer Mathew v South Indian Bank Ltd, the Court struck down rules governing the conditions of service of members of numerous tribunals, holding that the delegation of such matters to the executive without adequate guidance offends the separation of powers, and observing that short terms discourage competent persons from accepting appointment and increase dependence on the appointing authority.

The Information Commissions are not tribunals substituted for courts, and the analogy is therefore imperfect. But the principle underlying these decisions is not confined to substitution. It is that an authority exercising adjudicatory power over the executive must be structurally insulated from the executive, and that tenure and emoluments are the primary instruments of insulation. On that principle, the 2019 amendment moves in precisely the wrong direction.

There is a further constitutional dimension. In Namit Sharma v Union of India the Supreme Court characterised the Commissions as bodies discharging functions of a judicial character and imposed requirements as to their composition; on review, the Court modified the directions but did not disturb the underlying recognition that the Commissions perform adjudicatory work of consequence. If the right to information is a facet of Article 19(1)(a), the institution charged with vindicating it is not merely an administrative convenience; its enfeeblement is a limitation on the right itself, and one that is not obviously referable to any head of Article 19(2). Indian constitutional law has developed a substantial jurisprudence on the independence of adjudicatory bodies outside the regular judiciary, and its propositions bear directly on the Information Commissions.

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The Information Commissions are not tribunals substituted for courts, and the analogy is therefore imperfect. But the principle underlying these decisions is not confined to substitution. It is that an authority exercising adjudicatory power over the executive must be structurally insulated from the executive, and that tenure and emoluments are the primary instruments of insulation. On that principle, the 2019 amendment moves in precisely the wrong direction.

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6. Conclusion

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